VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1959~~ 1960

No. ~~582~~ 21

ARO MANUFACTURING CO., Inc. ET AL.,
PETITIONERS,

vs.

CONVERTIBLE TOP REPLACEMENT CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 11, 1959
CERTIORARI GRANTED FEBRUARY 29, 1960

VOL: 3 g. Record
IN BACK OF BRIEFS

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[fol. 623] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 56-357A

CONVERTIBLE TOP REPLACEMENT CO. INC., Plaintiff,

v.

ARO MANUFACTURING CO. INC., MAE SHAPIRO, GEORGE SHAPIRO, MARSHALL SHAPIRO, HAROLD R. SHAPIRO, JOHN RAYMOND HAMLIN, Defendants.

PLAINTIFF'S INTERROGATORIES UNDER RULE 33 F.R.C.P.—Filed August 9, 1956

Now comes Plaintiff, and, under the provisions of Rule 33, Federal Rules of Civil Procedure, propounds the following further interrogatories to Defendants and to each of them.

. . . . . .

8. (b) Have any changes in shape and/or construction [fol. 624] been made in Aro Regal convertible top Part No. 134, since January 1, 1954. If so, describe all changes in shape and/or construction that were so made.

8. (c) Have any changes in shape and/or construction been made in ARO Deluxe convertible top Part No. 134, since January 1, 1954. If so, describe all changes in shape and/or construction that were so made.

. . . . . .

Respectfully submitted,

Walter Jay Skinner, Paul V. Power, Attorneys for Plaintiff, 82 Devonshire Street, Boston 9, Massachusetts.

[fol. 625] Certificate of Service (omitted in printing).

[fol. 626] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 56-357A

[Title omitted]

ANSWER TO PLAINTIFF'S INTERROGATORIES—
Filed August 17, 1956

Now comes the Defendants, Aro Manufacturing Co. Inc., Mae Shapiro, George Shapiro, Harold R. Shapiro and John Raymond Hamlin, Defendants, in the above-entitled Action, and answer the Interrogatories of the Plaintiff under oath as follows:

* * * * * * *

8. (b) Yes. Very early in 1954, the cushion incorporated into the fabric was eliminated and a flap secured to the fabric and adapted to overlap the bodyline of the automobile was utilized. Subsequently the flap or fold was also eliminated completely. Other changes included the restyling of the top by changing the position of the seam; previously the seam was positioned at an angle of 45° at the rear valence, subsequently it was positioned in a vertical line.

*

8. (c) Same as 8 (b).

* * * * * * *

Aro Manufacturing Co. Inc., By Mae Shapiro, Treas.,
George Shapiro, Harold R. Shapiro.

* * * * * * *

[fol. 627] Notice of Service (omitted in printing).

[fol. 628]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 56-357-A

[Title omitted]

DEPOSITION OF J. R. HAMLIN—August 28, 1956

* * * * * * *

Present:

Elliott I. Pollock, Esq., 803 Ring Building, Washington, D.C., and Walter Jay Skinner, Esq., 82 Devonshire Street, Boston, Mass., of Counsel, for the Plaintiff.

David Wolf, Esq., 68 Devonshire Street, Boston, Mass., for the Defendants.

* * * * * * *

[fol. 629] By Mr. Pollock:

Q. I again note in this particular schedule on Plaintiff Exhibit S you have a heading "Package Assembly," and this particular heading states that every Aro top, and presumably that includes top No. 134, includes simple easy instructions, and that these instructions are enclosed in the package.

At the time that this literature, namely, Plaintiff Exhibit S, was being distributed, is it your recollection that such instructions were being enclosed with the tops?

A. Yes, I think so.

* * * * * * *

[fol. 630] By Mr. Pollock:

Q. I would like to clear up one other point and that is, it is my understanding that the replacement tops you manufactured for Ford to replace the original tops, were not in all respects similar to the Ford tops as originally made. Is that a correct statement?

A. Again, I am not qualified to answer yes or no.

* * * * * * *

[fol. 631]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil action No. 56-357A

[Title omitted]

DEPOSITION OF GEORGE SHAPIRO—August 28, 1956

* * * * * * *

[fol. 632] Cross examination.

By Mr. Wolf:

Q. Are you aware of a difference between the parts as made, replacement parts made by your company, replacement tops made by your company, and the original tops as made by the original manufacturer?

A. Yes, I am.

Q. Could you briefly describe what that difference is?

A. Well, as of now, as of this date?

Q. Would you describe it chronologically?

A. The first difference was in the back curtain where we changed the whole rear curtain assembly, different type of equipment in 1952, 1953 and 1954.

* * * * * * *

Q. Do you recall specifically any construction differences relative to the area around the rear quarter at the body line?

A. At the body line?

Q. Yes.

A. There was.

Q. Would you please describe those changes?

[fol. 633] A. When the Ford first came out in 1952, the rear quarter was assembled in an entirely different way. It had an over-size curtain, and what we did, we redesigned the back end of the top to tack on. Theirs was not tacked

* * * * * * *

[fol. 634] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil action No. 56-3574

[Title omitted]

DEFENDANTS' INTERROGATORIES UNDER RULE 33 F.R.C.P.—
Filed September 15, 1956

Now comes defendants and under the provisions of Rule 33 of the Federal Rules of Civil Procedure propound the following interrogatories to the plaintiff to be answered under oath.

1. a) How many stockholders does the plaintiff have?

1. b) Identify by name and address all the stockholders of the plaintiff corporation if there are less than fifty, and if there are more than fifty, identify those holding more than 2% of the stock.

2.) Identify by name, office and address the officers and directors of the plaintiff.

3. a) When was the plaintiff organized?

. . . . . .

4.) What is the business address of the plaintiff?

. . . . . .

6.) Does the plaintiff manufacture or sell any products?

. . . . . .

8.) Does the plaintiff own any interest in patents other than the one subject to the present action?

. . . . . .

[fol. 635] 10.) Does the plaintiff have a license under or in any other way benefit from a patent or patents other than the one subject to the present action?

. . . . . .

12. a) Does or has the plaintiff derive or derived an income from the patent subject to the present suit?

12. b) Does the plaintiff derive an income from any source other (if any) than the patent subject to the present action?

. . . . . .

[fol. 636] Aro Manufacturing Co. Inc., Mae Shapiro, George Shapiro, Harold R. Shapiro, John Raymond Hamlin, By Ezekiel Wolf, their attorney.

Certificate of service (omitted in printing).

[fol. 637]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

DEPOSITION OF HAROLD ROBERT SHAPIRO—October 4, 1956

. . . . . .

[fol. 638] By Mr. Pollock:

Q. You will recall that I was particularly concerned about a change in your top construction for the part No. 134 which occurred early in 1954. At that time, to refresh your recollection, the sealing strip or cushion which had previously been incorporated in your top was removed on advice of counsel?

[fol. 639] A. That is right.

Q. And I inquired at that time whether any complaints had been received from your customers to the effect that the function of the top had been impaired, or that the top did not work as well. Mr. Hamlin testified that any such complaints would come to him and he had never seen any. Do you recall that there were never any complaints, to your knowledge?

A. To my knowledge, I don't know of any.

Q. I believe your brother, George Shapiro, testified in the same way, and he stated that he felt the top still oper-

ated quite satisfactorily, and I will get into that subject later on, but would you agree with this statement?

A. Yes.

• • • • • • •

[fol. 640] Q. As I understand you, Mr. Shapiro, you are saying when a man in a trim shop has a customer, and that customer requests that he take off an old top on the [fol. 641] car and install a newer replacement top from the stock of a trim shop for that particular car and model, then you would say the body shop man would go to this trim jobber and buy a top, say an Aro top, with the proper model and part number, and would install that top on the old car?

Mr. Wolf: I object to the question on the ground, first, you state that the automobile owner, you did not state whether or not the top of the automobile in question was an original or replacement top, or top of original design. It is my understanding there is a difference between original design and replacement top in many instances, and a difference in method of replacement.

• • • • • • •

Q. And if a man, say, were to replace one of your tops on a 1952, 1953 or 1954 Ford, and that Ford had the original equipment on the car, he would take off this old top, and having seen how the old top is installed, would try to install the new top in the same way?

A. I don't think so. We don't install and we don't make our tops, as far as installations, like the original factory.

[fol. 642] Q. Would you explain that, please?

A. Yes. The original factory top on the 1952, 1953 and 1954 Ford and Mercury, namely, 1952 had such a tremendous curtain in the rear that I don't think there are three trimmers in the United States who would even attempt to put one on, because this top was installed when the car was completely dismantled.

Q. When you say curtain, if I may interrupt you, do you mean rear window?

A. That is right. Getting into the rear of the side quarter at the bottom. There is no trimmer in the country who would spend the time to reinstall a new top like in the

factory. I can't go into detail because there are too many bolts and nuts to talk about.

• • • • • • •

[fol. 643] Q. I believe we can get into this question of installation later on, but to revert for the moment to something you did say, you said that no trim man would take the time or the trouble to install one of your tops in the same way that it had been installed in the factory?

A. Another correction. He could not install it like the factory because we don't make it the same way.

• • • • • • •

[fol. 644] Q. As I gather from your testimony, Mr. Shapiro, there were some tops manufactured for both Chrysler and General Motors cars, and of course tops were manufactured for Ford cars, which had a cushion in them as originally manufactured?

A. Yes.

Q. Do you manufacture any tops now that still have such a cushion?

A. No.

Q. Were the cushions dropped from all these tops at substantially the same time?

A. All of them.

Q. Just pursuing this a bit further, as I recall, when the cushion was dropped from your part No. 134, you substituted a flap which we are calling a shingle in that part 134?

A. Yes.

Q. That was a temporary substitution which has since been dropped?

A. Correct.

Q. Was that shingle tried on other ones of your various models, or part numbers, I should say?

A. Yes. It was tried on 509, Lincoln, 1952 to 1955 Lincoln.

Q. Is that the only car it was tried on?

A. No. It was tried on General Motors, 1950 to 1954.

Q. As I understand it, the flap is not being used on any of the tops now?

A. We are using the shingle on 1950 to 1953 General Motors, all models, and 1954 Pontiac and Chevrolet.

• • • • • • •

[fol. 645] Q. It is the original pattern for the 1952 cars, [fol. 646] the 1952, 1953 and 1954 Fords in each case?

A. But the original pattern we made for the 1952 car is not the same pattern we are using today.

Q. I am interested in that. Would you say when you changed?

A. Yes. We made a top for the 1952 car, which was completely redesigned in 1953; that is, the seam structure. Actually, the size has to be the same because it is going on the same frame, but the seam structure and the structure of the rear valance and rear curtain have been changed, and we did away with the cushion and came out with the shingle, and then we did away with the shingle. In other words, we probably had five patterns made of that particular model car, 134.

• • • • • • •

[fol. 647] Q. When you say you had trouble, did you receive complaints about the shingle?

A. We sell enough tops locally, and I can personally spot one of our tops two streets away, practically, and I can, riding around, tell. We may not receive the complaint, but we like to act before the complaint. In other words, if I am driving home from work, or with my wife on a Sunday, out of the corner of my eye I could spot an Aro top, "how beautiful they are." But I can spot them pretty quick, [fol. 648] and naturally I can spot shrinkage, I can spot seam breakage, and broken zippers and tarnished finish tips, a lot of things the person who owns the car does not consider.

• • • • • • •

[fol. 649] Cross examination.

By Mr. Wolf:

[fol. 650] Q. Will you please tell me which cars you have seen and which you have knowledge of bear patent notices

ostensibly derived from Automobile Body Research Company or their licensees?

A. The only patent notice I have seen on any car is 1955 Oldsmobile, Buick and Cadillac, and probably 1956.

Q. Have you ever seen a notice on the 1952 to 1954 Ford, Mercury and Lincoln?

A. No.

Q. Or the 1955 Lincoln?

A. No.

Q. How about General Motors from 1950 to 1953? And 1954 Chevrolets and Pontiacs?

A. No.

• • • • • • •

[fol. 651] Q. Well, do you know when it was received relative to certain changes that were made in your fabric [fol. 652] top styles? By that I mean you were making fabric tops with what we call a cushion. You received notice, according to what you just testified. Was there any change in that particular structure of the various types of automobile on receipt of that notice?

A. Yes. We immediately changed all our patterns.

Q. Will you please tell me what changes you made after receipt of the notice, and approximately the dates when you made those changes, to the best of your knowledge? For the purposes of clarity I suggest you take the various types of cars individually and run down through those cars.

A. Ford 1952 to 1954 and Mercury, changes were made immediately upon receipt of the notification from a cushion to a shingle.

General Motors, 1950 to 1953, inclusive, and 1954 Chevrolet and Pontiac were immediately changed from a cushion to a shingle.

• • • • • • •

[fol. 653] Q. Now, I believe you testified that the General Motors line of cars followed the same, the replacement top of General Motors followed in general the same line as Ford, Mercury and Lincoln, or if you did not, will you please tell us what the general change of the General Motors line was?

A. The changes in our General Motors line was, the way they are manufactured by Aro is in a very similar construction as the 1955 and 1956 Chevrolet and Pontiac. In other words, no cushion, no wiper arm or shingle.

[fol. 654] Q. What about the replacement tops you now make, 1950 to 1953 General Motors?

A. Those are made with the shingle.

Q. They are still made with the shingle?

A. That is right. I might clarify for the purposes of the record that a shingle is constructed to be above the body line.

Q. I will get into that.

A. I am sorry.

Q. Now, you said that you still use 1950 to 1953 General Motors line of shingle. What about the 1954 model Chevrolet or Pontiac?

A. The same construction.

Q. Shingle?

A. Yes.

Q. Cadillac?

A. Up to 1953 inclusive.

Q. Up to 1953 inclusive you used the shingle, but 1954, 1955 and 1956 Buick, Oldsmobile and Cadillac?

A. No shingle.

Q. Chevrolet and Pontiac, no shingle?

A. That construction is the same, 1955 and 1956.

Q. The tops we are speaking about now are replacement tops made by Aro not the original manufacture?

A. Yes.

* * * * * * *

[fol. 655] Q. I believe I have asked you and you fairly well defined the cushions. Will you please define what you mean by shingle?

A. The shingle has a different appearance than the cush-
[fol. 656] ion. The shingle is a pocket stitched into the side quarter of the top and when installed on the car it is designed to stay about an inch above the body line.

* * * * * * *

[fol. 657] Q. Did you testify earlier that the cushion has a function of appearing attractive?

A. No, I did not.

Q. Could you tell me whether or not it has any design appearance or adds to design attraction?

A. No. The shingle is a much nicer looking outward appearance than the cushion.

* * * * * * * *

[fol. 658] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil action No. 56-357A

[Title omitted]

ANSWERS TO DEFENDANTS' INTERROGATORIES UNDER RULE 33, F.R.C.P.—Filed October 30, 1956

Now comes Plaintiff and answers certain of the interrogatories propounded to it by Defendants, as follows:

1. a) Plaintiff has three stockholders.

1. b) The stockholders of Plaintiff corporation are: Vivian L. Pollock, 7202 Lynhurst Pl., Chevy Chase, Maryland; Douglas G. Carlson, 5314 Augusta Street, Glen Mar Park, Md.; and Norman E. Quible, 4802—66th Pl., Parkway Knolls, Hyattsville, Md.

2. The officers of Plaintiff are: Vivian L. Pollock, 7202 Lynhurst Pl., Chevy Chase, Md., President; Douglas G. Carlson, 5314 Augusta Street, Glen Mar Park, Md., Secretary; and Norman E. Quible, 4802—66th Pl., Parkway Knolls, Hyattsville, Md., Treasurer.

[fol. 659] 3. a) Plaintiff does not understand the question; but assumes that it asked for the date of incorporation, and that date was, upon information and belief, April 5, 1956.

* * * * * * * *

4. The business address of Plaintiff is: 7202 Lynhurst Pl, Chevy Chase, Maryland.

* * * * * * * *

6. No. Plaintiff does not manufacture or sell any products at the present time, although there is a possibility that Plaintiff may do so in the future.

* * * * * * * *

8. No.

* * * * * * * *

10. No. The only patent under which Plaintiff has a license or in any other way benefits is Mackie-Duluk patent No. 2,569,724.

* * * * * * * *

12. a) No. Plaintiff has not received any income thus far from the patent in suit.

12. b) Objected to.

* * * * * * * *

[fol. 661] Convertible Top Replacement Co., Inc.,
By Vivian L. Pollock, President

[fol. 662] Certificate of Service (omitted in printing).

[fol. 663] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 56-357-A

[Title omitted]

PLAINTIFF'S ANSWER TO DEFENDANTS' INTERROGATORY 12(b)
—Filed December 17, 1956

12(b) No. This answer is based upon the assumption that the question asks for some present source of con-

tinuing or intermittent income from third parties. If the question is meant to ask whether plaintiff has derived any income in the past, then the answer is that plaintiff has received income in the past and expects, through proper business relationships, to receive income in the future. However, there is no present income-producing relationship between plaintiff and other persons or organizations. In particular, plaintiff has not received in the past, and does not presently expect to receive in the future, any income directly or indirectly from Automobile Body Research Corporation.

Convertible Top Replacement Co., Inc., By Vivian L. Pollock, President.

[fol. 664] Certificate of Service (omitted in printing).

[fol. 665] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 56-357-A

[Title omitted]

PLAINTIFF'S REQUESTS FOR ADMISSION—
Filed November 13, 1956

Now comes Plaintiff and, under the provisions of Rule 36, Federal Rules of Civil Procedure, requests that Defendants and each of them, within ten (10) days after service of this request, make the following admissions for the purpose of this action only:

16. Subsequent to receipt of Plaintiff's Exhibit C, inviting the attention of Aro Manufacturing Company to Mackie and Duluk Patent 2,569,724, Aro Manufacturing Company, on advice of its legal counsel, redesigned its

replacement top Part No. 134, to eliminate a cushion which had previously been incorporated into said top.

. . . . . .

[fol. 666] Respectfully submitted,

By Walter Jay Skinner, Attorney for Plaintiff.

[fol. 667] Certificate of Service (omitted in printing).

[fol. 668] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

DEFENDANT'S ANSWER TO PLAINTIFF'S REQUEST FOR ADMISSION—Filed December 6, 1956

Now comes the defendants in the above entitled action and collectively answer the plaintiff's request for admission as follows:

16. The redesigning of the replacement top, Part No. 134, subsequent to receipt of plaintiff's exhibit C, was undertaken in the part because certain structural improvements were required.

. . . . . .

[fol. 669]

Aro Manufacturing Co. Inc., Mae Shapiro, George Shapiro, Marshall Shapiro, Harold R. Shapiro, John Raymond Hamlin.

Certificate of service (omitted in printing).

[fol. 670]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil action No. 56-357 A

[Title omitted]

DEPOSITION OF HAROLD ROBERT SHAPIRO—
February 20, 1957

. . . . . .

[fol. 671] HAROLD R. SHAPIRO, having been first duly cautioned and sworn, on oath deposes and says:

. . . . . .

[fol. 672] Cross examination.

By Mr. Pollock:

. . . . . .

[fol. 673] 134Q. I mean by my question what is the physical reason that you could put your hand in further one time than the other time?

A. The physical reason, the physical difference is that when the cars were originally made by the car manufacturers, they were designed to keep the water out with a weather tight seal.

135Q. Both cars, the Ford and Oldsmobile?

A. That is correct. They were designed to keep the water out. We are deflecting water and relying on any water that did come in, we are relying on the drains.

136Q. Is that in both cars again?

A. That is in both cars.

. . . . . .

[fol. 674] HAROLD ROBERT SHAPIRO, Resumed.

Re-cross examination.

By Mr. Pollock:

. . . . . .

[fol. 675] 281Q. You say that the part No. 204 has a flap which was to be fastened on the inside of the car?

A. Fastened inside and outside both. It was sort of—

282Q. It was a split affair?

A. That is right. We never manufactured them that way, but the original—

283Q. How did you manufacture them?

A. We just went outside of the car, but the original car from Detroit was fastened inside and out.

[fol. 676] Redirect examination.

By Mr. Wolf:

440Q. Can you estimate approximately the number of replacement top manufacturers and replacement top dealers who install replacement tops throughout the United States?

A. How many places install tops?

441Q. Yes.

A. An estimate?

442Q. Yes.

A. I would take a stab in the dark and say 15,000.

[fol. 677] 443Q. Is that a stab in the dark or a reasonable guess or what?

A. That is a reasonable guess.

Mr. Pollock: That is for installing tops?

The Witness: That is right. And that includes custom makers also.

444Q. Do you have any idea of how many replacement tops are made annually in this country of all makes?

A. I have not the slightest idea.

[fol. 678]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

STENOGRAPHIC RECORD OF TRIAL BEFORE
ALDRICH, D.J.—AUGUST 21, 1958

[fol. 679] COLLOQUY

Mr. Wolf: In so far as repair or reconstruction is concerned, I believe, your Honor, we will offer further testimony on the amount of repair, the degree of repair, the

customs in the trade, the relative importance of the wiper arm in this particular patent as compared with the fabric, the body, and the folding bow structure.

We will offer some evidence as to the cost of the folding bow structure and other testimony indicative of the fact that a repair does not—a repair which is permissible within the scope of the Mackie patent would permit one to replace a fabric top and that the mere replacing of a fabric top does not contribute to an infringement.

* * * * * * *

[fol. 680] HAROLD SHAPIRO, Recalled.

* * * * * * *

[fol. 681] Court Room No. 6,
Federal Building, Boston, Mass.

Redirect examination.

By Mr. Wolf:

* * * * * * *

[fol. 682] Q. In other words, you don't actually use the original top as a model?

A. No. That is evident by placing our 134 over the original 134. The structure is different. Ford Motor Company has engineers that work on these things for three years before they adopt it, from the time it is in the blueprint stage to the time it is a production model, usually three years elapse. We are usually pressed with three hours to get a pattern out because the dealer or somebody wants their car back.

* * * * * * *

[fol. 683] Q. You just described the method of manufacturing original cars. Will you tell us whether the same method could be used in the art of replacements?

A. No, it could not.

Q. Manufacture?

A. No, it could not.

* * * * * * *

[fol. 684] AFTERNOON SESSION

HAROLD SHAPIRO, Resumed.

Redirect examination.

By Mr. Wolf, continued:

• • • • • • •

[fol. 685] Q. I pose the question: If the wiper arm is missing, from your knowledge do you ever find this wiper arm to be missing more than on an odd occasion?

A. We have never seen one missing on a Ford. It is a common occurrence on, well, I couldn't say common occurrence, but it would happen, oh, one out of ten or fifteen on a General Motors car.

• • • • • • •

[fol. 686] Q. You also mentioned previously that occasion-
[fol. 687] ally you find prongs missing or the trough rusted. What do you do when you get conditions of this nature on cars of this type?

A. Well, there are two ways to do it. One way is to just leave the flap inside and use the screws that held the recess well cover on, or it could be bent up in the fashion demonstrated today, and snapped on the outside.

Q. I see. Do you know if this has been done?

A. Yes, it has been done.

Q. Have you seen it done?

A. Yes, I have.

Q. When does this most often occur, this type of difficulty?

A. Well, I would say, getting along about now, from here on in probably some of these drain troughs will be rusted out and become inoperative, and screws will be rusted in there.

Q. You must be referring to a specific car when you say "starting about now."

A. Yes. The 1952 Fords.

• • • • • • •

[fol. 688]

IN UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5488

ABO MANUFACTURING CO., INC., et al.,
Defendants, Appellants,

v.

CONVERTIBLE TOP REPLACEMENT CO., INC.,
Plaintiff, Appellee.

BRIEF FOR DEFENDANTS, APPELLANTS

[fol. 689] QUESTIONS PRESENTED

The questions presented in this appeal are:

1. Is not an individual entitled to maintain or have maintained in working condition, a patented combination rightfully acquired by having replaced a part which expectedly became worn or defective before other integral parts of the patented combination without paying a second royalty?

2. Where a patented combination recites as one element in the combination, an unpatentable component which is normally manufactured as an appendage to much larger wearable and non-patentable structure, may not such structure be replaced together with the appendage?

3. Does one infringe a patent by replacing an unpatentable component of a patented combination in a manner which was not disclosed as operable by the patentee?

4. Does the sale of an unpatentable component for replacing a worn element of a patented combination constitute contributory infringement under 35 U.S.C. § 271 (1952).

[fol. 690] NARRATION OF EVENTS

Replacement techniques and styling of the replacement top vary from that practiced by the original automobile manufacturer, often resulting in a replacement top appearing, and secured in many instances in a different manner from the original installation.

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[fol. 691] ARGUMENT

Replacing Worn Fabric Tops Is a Permissible Repair Under the "Common Sense" Doctrine Established by the Supreme Court and Followed in This Circuit.

A number of cases have considered the problem of what constitutes permissible repair as compared with a non-permissible reconstruction of the patented combination. In many instances it is rather difficult to draw a line between permissible repair and unpermissible reconstruction. In considering these cases, courts have evolved several tests in attempting to properly classify acts as being permissible or not. The dominant view which is followed in this particular circuit was established by the Supreme Court in *Heyer* v. *Duplicating Mfg. Co., supra* at 17, where the court applied what might be termed "a common sense" doctrine. In that case the court said:

> We have only to establish the construction of a bargain on principles of common sense applied to the specific facts . . . 263 U.S. at 102.

[fol. 692] This doctrine has been carefully followed by this court where it stated in the leading case of *Goodyear Shoe Mach. Co.* v. *Jackson, supra* at 18:

> A purchaser, then, may repair, but not reconstruct or reproduce, the patented device or machine. Repair is "restoration to a sound, good, or complete state after decay, injury, dilapidation, or partial destruction." Reconstruction is "the act of constructing again." Reproduction is "repetition," or "the act of reproducing."

• • •

These definitions are instructive in bringing home to the mind that repair carries with it the idea of restoration after decay, injury, or partial destruction, and that reconstruction or reproduction carries with it the idea of complete construction or reproduction over again.

But the difficult question still remains, what is legitimate repair, and what is reconstruction or reproduction as applied to a particular patented device or machine? When does repair destroy the identity of such a device or machine and encroach upon invention? At what point does legitimate repair of such device or machine end, and where does illegitimate reconstruction begin?

It is impracticable, as well as unwise, to attempt to lay down any rule on this subject owing to the number and infinite variety of patented inventions. *Each case, as it arises must be decided in the light of all the facts and circumstances presented, and with an intelligent comprehension of the scope, nature, and purpose of the patented invention, and the fair and reasonable intention of the parties. Having clearly in mind the specification and claims of the patent, together with* [fol. 693] *the condition of decay or destruction of the patented device or machine, the question whether its restoration to a sound state was legitimate repair, or substantial reconstruction or reproduction of the patented invention, should be determined less by definitions or technical roles than by the exercise of sound common sense and an intelligent judgment.* (Emphasis added) 112 Fed. at 150.

While courts of other circuits have also discussed what constitutes the dominant element of the invention, most still apparently apply the rationale of the "common sense" doctrine. See *Landis Machine Co.* v. *Chaso Tool Co.*, 141 F.2d 800 (6th Cir.), *cert. denied*, 323 U.S. 720 (1944).

It is not clear what doctrine the district court applied in concluding that replacing worn fabric tops constituted reconstruction of the patented combination rather than per-

missible repair. Regardless of what doctrine is applied its conclusion is unsound. The application of the "common sense" doctrine requires a review of (a) what Mackie and Duluk *claimed* as their invention in the light of the relevant prior art, (b) the normal expectation of vendors of convertible automobiles, (c) the normal expectation of purchasers of convertible automobiles, (d) the rewards already received by the plaintiff's assignor, (e) the fact that the fabric tops are frequently replaced, (f) the custom of the replacement trade in replacing the tops and, (g) that the fabric top itself is old and unpatentable.

[fol. 694]

IN UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

STIPULATION RE EXHIBITS

On May 11, 1959, the following stipulation was approved and filed:

"Now come the parties in the above-entitled appeal and stipulate, subject to the approval of the Court, that the following exhibits shall be before the Court in physical form in this appeal with the same force and effect as if such exhibits were physically reproduced as a record appendix.

Plaintiff's exhibits 11A to 11E inclusive
Defendants' exhibit K
Defendants' exhibit L
Defendants' exhibit M
Defendants' exhibit N
Defendants' exhibit N'
Defendants' exhibit O
Defendants' exhibit P
Defendants' exhibit R
Defendants' exhibit S
Defendants' exhibit T
Defendants' exhibit T'
Defendants' exhibit U
Defendants' exhibit V

Defendants' exhibit W
Defendants' exhibit X
Defendants' exhibit Y
Defendants' exhibit MM
Plaintiff's exhibits 1, 2, 3, 4, 5, 6, 10, 12, 13, 14, 15A to 15B, 16A to 16B, 26A to 26B, 17

[fol. 695] April 29, 1959

Aro Manufacturing Co., Inc. et al., By David Wolf, Attorney for Defendants, Appellants, Ezekiel Wolf, Wolf & Greenfield, 82 Devonshire Street, Boston 9, Massachusetts.

May 4, 1959

Convertible Top Replacement Co., Inc., By Paul V. Power, Attorney for Plaintiff, Appellee, Gaston, Snow, Motley & Holt, 82 Devonshire Street, Boston 9, Massachusetts.

Approved:

C. Magruder, Ch. J.

MINUTE ENTRIES

Thereafter on May 22, 1959, appellee filed a motion to permit introduction into the record of additional license agreements which motion was denied by the Court on June 2, 1959.

Thereafter on June 4, 1959, this cause came on to be heard and was fully heard by the Court, Honorable Calvert Magruder, Chief Judge, and Honorable Peter Woodbury and [fol. 696] Honorable John P. Hartigan, Circuit Judges sitting.

[fol. 697]

IN UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5488.

ARO MANUFACTURING CO., INC., et al.,
Defendants, Appellants,

v.

CONVERTIBLE TOP REPLACEMENT CO., INC.,
Plaintiff, Appellee.

Appeal from the United States District Court for the District of Massachusetts.

Before Magruder, Chief Judge, and Woodbury and Hartigan, Circuit Judges.

David Wolf and Charles Hieken, with whom Ezekiel Wolf, Wolf & Greenfield was on brief, for appellants.

Elliott I. Pollock, with whom Paul V. Power was on brief, for appellee.

OPINION OF THE COURT—August 31, 1959

Woodbury, Chief Judge. This is an appeal from an interlocutory judgment ordering, adjudging and decreeing that claims 3, 4, 5, 7, 8, 9 and 10 of United States Patent No. 2,569,724, issued on October 2, 1951, to Harry A. Mackie and Stanley Duluk for "Convertible Folding Top with Automatic Seal at Rear Quarter" are valid and have been infringed by the defendants, that the defendants, their officers, agents and servants be enjoined from further infringement, and that the question of the plaintiff's damages for past infringement be referred to a Master.

The plaintiff-appellee, Convertible Top Replacement Co., [fol. 698] Inc., is the possessor by territorial grant of the right, title and interest in and to the Mackie-Duluk patent in and for the Commonwealth of Massachusetts together

with all rights of action accruing since December 30, 1953, for infringement thereof in the Commonwealth. The defendants manufacture and sell, for replacement purposes only, the fabric portions of convertible tops which they either install themselves or sell pre-fabricated for installation by trimmers, that is to say, persons engaged in the business of putting on new tops, repairing upholstery etc., and, to an insignificant extent, to do-it-yourself car owners. The defendants' tops are custom-designed by make of car and year of manufacture to permit accurate replacements on all standard cars manufactured in the United States and are so advertised. They pre-fabricate and keep in stock the fabric parts only of convertible tops for various models of cars manufactured by the Ford Motor Company from 1952 to 1955, and for many models of General Motors cars manufactured for the years 1950 to 1954, when many convertible automobiles produced by those two manufacturers were equipped with Mackie-Duluk tops.

The District Court resolved the issue of the validity of the claims of the Mackie-Duluk patent in suit in favor of the plaintiff. It said: "Mackie-Duluk was a substantial and enlightened step, filling a long-felt want, in a field in which defendants have produced, with one exception, only paper patents, the most emphasized being foreign, which did not even purport to do what Mackie-Duluk accomplished." On this appeal, however, the question of validity has hardly been argued at all and we are not at all sure that all the evidence on that issue has been included in the parts of the record printed in the joint record appendix before us. Under these circumstances we can only take the validity of the patent claims in suit for granted [fol. 699] and turn immediately to the hotly contested issue of infringement.

The basic question argued before us on this appeal is whether the defendants, by manufacturing and selling replacement convertible top fabrics cut to fit and adapted for use in the combination of elements covered by the plaintiff's patent, are guilty of contributory infringement as defined in Title 35, U.S.C. § 271(c), or whether, in doing what they did, they merely were making a permissible replacement of a part which expectedly became worn out or

defective sooner than other parts of the patented combination.

In addressing ourselves to this question we turn first to the patent in suit and its prior art.

Folding tops for vehicles consisting of bows of wood or metal covered with a flexible waterproof fabric (in the days of "The Deacon's Masterpiece; or, The Wonderful 'One-Hoss Shay'"[1] with leather) are, of course, as old as the automobile art which in the beginning only adopted with necessary modifications the much older art of collapsible tops for chaises, buggies and some other horse drawn vehicles. The rear panels of the folding tops of earlier days were fastened permanently at the bottom to the outside of the top of the rear portion of the body of the vehicle, and the quarters, the rear portions of the sides of the vehicle, if protected at all, were protected with flaps or curtains, sometimes integral with the top and sometimes not, fastened at the bottom to the outside of the top of the body with buttons, snaps or some equivalent means of fastening. Naturally, to prevent tearing, these quarter flaps had to be unfastened by hand when the top was lowered and when the top was put up fastened again by [fol. 700] hand for neat appearance and also to prevent the entrance of rain. This manual fastening and unfastening of the bottoms of the quarter flaps presented no great problem until the advent of the so-called convertible automobile with a folding top operated mechanically rather than manually. The problem presented by the quarter flaps of tops of this kind was first partially solved by fastening the bottom of the flap to the outside of the top of the body of the vehicle with "releasable fastening means," that is to say, with some sort of slide fastening device which would detach automatically when the top was lowered. The major part of the problem remained, however, for when the top was put up the flaps had to be fastened manually, which meant that the operator was required to get out of the car altogether, or at least to reach out, often, of course,

[1] Poem by Oliver Wendell Holmes, 1857-1858:

"Boot, top, dasher, from tough old hide
Found in the pit when the tanner died."

in the rain. The object of the Mackie-Duluk patent was "to provide an automatic fastening and sealing means at the top and sides of the tonneau of the convertible" which "never has to be operated or touched by the driver of the car." And, as we have already indicated, the District Court found that the patentees succeeded in attaining their object by devising a patentable combination of elements.

The Mackie-Duluk device consisted of providing an elongated flap integral with the quarter sections of the fabric top adapted to be permanently fastened at the bottom deep within the body of the car, at or perhaps below, but certainly not in front, of the axis of rotation of the bows, to a trough welded to the body of the car and provided with a drain to carry off water entering between the flap and the car body. In addition, to minimize the entrance of water between the body and the flap, they provided a "wiper arm" so-called, which in effect acted as an additional, low, rearward bow pressing the downwardly extending flap outwardly against the top of the body of the vehicle as the top is raised from its folded position to close, or [fol. 701] substantially to close, any gap there might be between the inside of the top of the body of the car and the flap extending downward into the interior of the automobile body.

Claim 8 of the patent may be taken as typical of those in suit. It reads:

> "In a convertible automobile body, the combination of a lower metal body structure or tonneau having a body panel, a folding bow structure supported by the tonneau and having flexible top material supported by the bows and having the top material at the rear quarter extending down, a rain trough secured to the bottom of said flexible top material and to said panel on the inside and below the top of the metal body or tonneau, said flexible top material spreading and adjoining the inside of the top of the side of the tonneau when the bow structure is raised, and a wiping arm secured to a part of the movable bow structure and acting simultaneously with said bow structure to engage the inside lower portion of the top material in raising the top to press the two adjoining members

toward each other and thereby produce a weather seal therebetween."

The defendants, as we have said, manufacture and sell only the fabric part of the convertible top structure. And from this they argue at length that, since fabric tops stretched over bows are admittedly very old in the vehicle art, they are only producing an unpatentable component of the combination covered in the patent in suit. If the argument were sound "there would be nothing to discuss," as the Court pointed out in *Heyer* v. *Duplicator Mfg. Co.*, 263 U.S. 100, 101 (1923). The argument, however, is unsound for the Mackie-Duluk patent does not broadly cover the fabric portion of a folding top of any form or shape. [fol. 702] It specifically covers the fabric part of such a top of a particular form or shape, *i.e.*, one with elongated flaps at the rear quarters designed to extend deep within the body of the convertible automobile for permanent attachment to a rain trough at or below the axis of rotation of the bows. It is true that the District Court found that it was not new to bring "the fabric from outside the tonneau at the rear quarters, inside." But it found that the patentees were the first to extend the flaps down far enough so that their bottom lines were at the axis of rotation of the bows and to show that there the fabric could be permanently attached to the bows and the tonneau without ripping when the top was lowered or raised, and that therein lay the patentable novelty of the patentees' fabric.[2]

Form being patentable in itself, see *Wilson* v. *Simpson*, 9 How. 108, 123 (1850), in which it is said: "Form may be given to a piece of any material,—wood, metal, or glass—so as to produce an original result, or to aid the efficiency of one already known, and that would be the subject for

[2] Since the element replaced by the defendants-appellants was a patented component of the Mackie-Duluk combination, the cases of *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U.S. 425 (1894), and *Micromatic Hone Corp.* v. *Mid-West Abrasive Co.*, 177 F.2d 934 (C.A. 6, 1949), upon which they rely, are not in point, for the elements replaced by the defendant in those cases, the roll of toilet paper and the abrasive stone, respectively, were not patented elements of the devices covered by the patents there in suit.

a patent," we come to the question whether the shape of the patentees' fabric constituted "a material part of the invention" within the meaning of that phrase as used in § 271(c) of Title 35 U.S.C. quoted in the margin.[3]

[fol. 703] Reading this section in the light of the earlier decisions to be considered presently we do not think it could have been intended to prevent the rightful owner of a patented machine from making repairs to a broken, worn or defective part, even though covered by the patent, either himself or through someone other than the patentee. Nor do we think the section is to be read to prevent the owner of a patented machine from replacing from a source other than the patentee minor patented parts of a combination which in the normal use of the machine may be expected frequently to wear out or break and hence to require replacement at short intervals to keep the whole machine in working order and condition. That is to say, we think the rule stated and applied in *Wilson* v. *Simpson*, 9 How. 108 (1850), and *Heyer* v. *Duplicator Mfg. Co.*, 263 U.S. 100 (1923), is still the rule under Title 35 U.S.C. § 271(c).

In the *Wilson* case the Court held that the owner of a patented planing machine had the right to keep his machine in operation by replacing the patented cutting knives therein from sources other than the patentee, it appearing that the knives, although an essential element of the patented combination, could be expected in the normal use of the machine to wear out, become useless and require replacement at least every sixty or ninety days. In reaching this result the Court said at page 125:

> The right of the assignee [the owner of the machine] to replace the cutter-knives is not because they are of perishable materials, but because the inventor of the machine has so arranged them as a part of its combination, that the machine could not be continued

[3] Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a stable article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer."

in use without a succession of knives at short intervals. Unless they were replaced, the invention would have been but of little use to the inventor or to others. The other constituent parts of this invention, though liable [fol. 704] to be worn out, are not made with reference to any use of them which will require them to be replaced. These, without having a definite duration, are contemplated by the inventor to last so long as the materials of which they are formed can hold together in use in such a combination. No replacement of them at intermediate intervals is meant or is necessary. They may be repaired as the use may require. With such intentions, they are put into the structure. So it is understood by a purchaser, and beyond the duration of them a purchaser of the machine has not a longer use. But if another constituent part of the combination is meant to be only temporary in the use of the whole, and to be frequently replaced, because it will not last as long as the other parts of the combination, its inventor cannot complain, if he sells the use of his machine, that the purchaser uses it in the way the inventor meant it to be used, and in the only way in which the machine can be used."

In *Heyer* the question was whether the owners of certain costly and durable patented duplicating machines were entitled to replace from any source they chose the patented bands of gelatine used in the machines for transferring the print to be multiplied, which bands were of a size, were attached to spools adapted for, and were intended for use in the patented machine. In answering this question in the affirmative the Court specifically pointed out that while the machine might last indefinitely the bands were exhausted after limited use, about one hundred copies, and were "cheap and common articles of commerce." Reaffirming the *Wilson* case it said:

"The owner when he bought one of these machines had a right to suppose that he was free to maintain it [fol. 705] in use, without the further consent of the seller, for more than the sixty days in which the present gelatine might be used up."

And then the Court said that in cases of this sort the judicial function is "only to establish the construction of a bargain on principles of common sense applied to the specific facts."

When replacement of a patented component of a patented combination constitutes a legitimate repair and when it constitutes a forbidden reconstruction of the combination of which it forms a part is difficult to determine and cannot be determined by the application of any verbal formula. Each case must be decided on its own facts, pretty much as an individual instance. This court put the problem neatly and succinctly in *Goodyear Shoe Machinery Co.* v. *Jackson*, 112 Fed. 146, 150 (C.A. 1, 1901), wherein it is said:

> "It is impracticable, as well as unwise, to attempt to lay down any rule on this subject, owing to the number and infinite variety of patented inventions. Each case, as it arises, must be decided in the light of all the facts and circumstances presented, and with an intelligent comprehension of the scope, nature, and purpose of the patented invention, and the fair and reasonable intention of the parties. Having clearly in mind the specification and claims of the patent, together with the condition of decay or destruction of the patented device or machine, the question whether its restoration to a sound state was legitimate repair, or a substantial reconstruction or reproduction of the patented invention, should be determined less by definitions or technical rules than by the exercise of sound common sense and an intelligent judgment."

[fol. 706] Applying as best we can the "common sense" test of the case last cited and the *Heyer* case we conclude that the defendants were not making permissible repairs to, but were substantially reconstructing, the convertible top combination covered by the Mackie-Duluk patent. Couched in terms of the statute, we think they were making and selling a component of the plaintiff's patented combination "constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a stable

article or commodity of commerce suitable for substantial noninfringing use."[4]

In substantiation of this conclusion we point out that the fabric portion of the top is not a minor or relatively inexpensive component of the patented combination, or a part of the invention which expectably would wear out after a very short period of use, like the cutter-knives in the *Wilson* case or the bands of gelatine in the *Heyer* case. There was testimony, and the court below found, that barring accidental damage the average life of a convertible top was about three years, although with care under favorable conditions or in the hands of a person not too fastidious as to appearance it would last much longer. The expectable life span of the fabric is no doubt shorter than the expectable life span of the other components of the convertible top and of the car itself. But the life of the [fol. 707] fabric is not so short, nor is the fabric so cheap, that we can safely assume that an owner would rationally believe that in replacing it he was making only a minor repair to his top structure. On the contrary, we believe that replacing the fabric would be counted a major reconstruction of the top assembly. In short, we agree with the District Court's finding of infringement.

Other arguments advanced by the appellants have been considered but are rejected as too insubstantial to call for discussion.

Judgment will be entered affirming the judgment of the District Court.

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[4] The appellants do not establish that their prefabricated tops of which complaint is made are stable articles or commodities of commerce "suitable for substantial noninfringing use," and thus escape application of the statute, by pointing out that the tops it pre-fabricates for convertibles having the Mackie-Duluk structure can be applied in a noninfringing way by cutting off the flaps and putting on snap fasteners to cooperate with the snap fasteners on the outside of the top of the tonneau to hold the cover or boot customarily provided to cover the top and protect it from dust when the top is down. The fact remains that the appellants do not make tops for Mackie-Duluk equipped convertibles for application in the old fashioned prior art way but only in the way shown in the Mackie-Duluk patent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JUDGMENT—August 31, 1959

This cause came on to be heard from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court: Roger A. Stinchfield, Clerk.
By Dana H. Gallup, Chief Deputy Clerk.

Thereafter, on September 9, 1950, appellants filed a petition for rehearing which was denied by the Court on September 15, 1959.

[fol. 708] Thereafter, on September 24, 1959, mandate was stayed until further order of Court.

[fol. 709] Clerk's Certificate to foregoing transcript omitted in printing).

[fol. 711]

SUPREME COURT OF THE UNITED STATES

No. 582—October Term, 1959

ARO MANUFACTURING CO., INC., et al., Petitioners,

vs.

CONVERTIBLE TOP REPLACEMENT CO., INC.

ORDER ALLOWING CERTIORARI—February 29, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.